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December 1, 2015

The Honorable Thomas E. Wheeler, Chairman
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: Implementation of Section 103 of the Stella Reauthorization Act of 2014, MB Docket No.15-216 Written Ex Parte Communications

Dear Chairman Wheeler:

On behalf of BEK Communications Cooperative, I submit the following comments in response to the Commission's rulemaking proceeding to review the "totality of the circumstances test" used in determining whether retransmission consent negotiations have been negotiated in "good faith" as required by the Communications Act.

BEK Communications Cooperative is a North Dakota Cooperative Association founded in 1952. BEK is headquartered in Steele, North Dakota, and it provides services to more than 6,000 customers throughout six counties in south-central North Dakota. BEK provides its telecommunications services - local and long distance telephone, high-speed internet, and digital tv - via a 1,400 mile integrated fiber optic network.

The Commission's Notice of Proposed Rulemaking invites comment on "any other practice that should be considered evidence of bad faith under the totality of the circumstances test" as part of retransmission consent negotiations. The Notice is timely in that BEK's retransmission agreement fees have increased recently in the neighborhood of between 300% - 400%. What follows are some of the practices that BEK considers to be detrimental to good faith negotiations and which in fact constitute a market failure. These practices should be evidence of bad faith under the "totality of the circumstances test."

Network exclusivity.

Because of exclusivity rules, BEK is forced into unfair, monopoly-based negotiations concerning the rebroadcast of some content. Based on BEK's service area, this has resulted in BEK paying twice as much for the same network product for the West half of BEK's service area in North Dakota as the East half. This anomalous result is a direct result of the lack of competition between network distributors and the lack of BEK's bargaining power.

The Commission's exclusivity rules result in BEK and other MVPD's being faced with a choice – accept unreasonable terms or face the very real threat of a blackout or loss of the broadcast channel. As the Commission is aware, the economics of blackouts or loss of the channel is especially damaging to MVPD's because of the real competition between providers. If a subscriber changes providers due to a blackout, that loss is likely to be a long term economic detriment whereas the any loss of advertising revenue to the broadcaster is likely to be of short duration.

The breakdown in the market is further evidenced by the fact that BEK is required as part of retransmission agreements to pay a fee for certain subscribers notwithstanding the fact that the over-the-air broadcast signal does not reach the subscriber's home. In other words, the broadcaster has not invested in sufficient infrastructure to provide the subscriber an over-the-air signal. Yet the broadcaster is able, due to the failure in the market, to require BEK to pay the broadcaster to provide to the subscriber its signal.

The broadcaster has been granted by the Commission a monopoly concerning the over-the-air broadcast signal. Inherent in this grant is an obligation that the broadcaster will invest in sufficient technology and equipment to provide a quality signal to the people living within the territory so that they can receive the broadcast content over-the-air, free of charge. But for some of BEK's service area this model has broken down in that the broadcasters are not living up to their obligation to provide a signal. Rather, the consumer is forced to pay BEK or other MVPD to provide the broadcast signal. The breakdown is even more egregious in that the broadcaster then charges BEK to provide its signal to BEK's subscriber. This practice should be reformed. If the broadcaster is not able to provide a signal within the monopoly territory then the broadcaster should not only be precluded from charging a fee for the channel, it should have to pay to BEK or other MVPD a fee for carrying its signal to the customer.

Absent a breakdown in the market BEK would be able to negotiate fair, reasonable retransmission agreements. The threat of a blackout or loss of the channel, however, is a coercive tactic used to force concessions which prevent reasonable, fair agreements. These tactics distorts the market and are detrimental to the MVPD and to consumers as well. The Commission should not allow broadcasters to use monopoly status to harm the market and consumers. The Commission should adopt rules modifying the exclusivity rules so as to foster further competition and to eliminate the coercive effects of the threat of blackouts and loss of service.

Forced bundles.

Another example of the defect in the market is the power of broadcasters to force BEK and other MVPD's to agree to bundled services as a condition of entering into retransmission agreements. BEK has been forced to choose between paying an exorbitant fee for the prime content it seeks, or agreeing to a less exorbitant fee on condition that BEK agree to carry not only the prime content but also other current content and/or future content, sight unseen, when the content becomes available.

This type of forced bundling is harmful not only to BEK's and its business model, but also to BEK's consumers who are forced to purchase bundles containing channels that they do not demand, thereby reducing the overall utility they get from BEK.

The Commission should adopt a rule prohibiting a broadcaster from offering a bundle of services unless at the same time the broadcaster also provides a good-faith, comparable a la carte offer alongside the bundled offer. The Commission should conclude that it is a bad-faith practice for a broadcaster to offer an unreasonable, exorbitant a la carte offer. The Commission should also adopt a rule prohibiting a broadcaster from prohibiting a MVPD from delivering bundled channels in an unbundled manner – that is a prohibition against requiring a MVPD to include a bundled channel in the MVPD's basic or expanded basic package.

Confidentiality provisions.

It is BEK's experience that broadcasters demand confidentiality provisions as part of retransmission agreements. Such terms are designed to make it more difficult for MVPD's such as BEK to negotiate effectively concerning rebroadcast terms. BEK agrees with the proposal presented to the Commission, as noted in Footnote 43 of the Notice of Proposed Rulemaking, that the Commission should require parties negotiating retransmission consent disclose relevant information substantiating and verifying their bargaining claims and that the standard for relevancy should be liberally construed as in labor law, and that the Commission should also require parties to publish and make available in their public files "rate cards" or other information about the prices they charge in a market.

Conclusion.

Not long ago a representative of BEK overheard two broadcasters generally discussing retransmission agreements and one indicated to the other "those small rural coops are dumb, they will pay anything we tell them and they have no leverage." This comment is only partially correct. Cooperatives like BEK are not dumb. But they are forced to agree to pay anything the broadcasters demand because they have no leverage. They have no leverage because the Commission's current rules have resulted in a failure in the market. BEK hopes that the Commission changes its rules to address the practices outlined herein so as to correct the market imbalance.

BEK looks forward to reviewing the comments and other submissions of other interested parties and reserves the right to address any issues raised in the comments or responses.

Sincerely,

/s/Monte L. Rogneby
Monte L. Rogneby

CC: Derrick Bulawa, CEO BEK Communications Cooperative